



United States
Department of
Agriculture

Farmers
Home
Administration

Washington
D.C.
20250

FmHA AN No. 1877 (1951)

March 8, 1989

SUBJECT: Information Needed in Denial of a Borrower's
Primary Loan Servicing Request Based on Lack of
Good Faith

TO: State Directors, District Directors and
County Supervisors

PURPOSE/INTENDED OUTCOME:

The purpose of this Administrative Notice (AN) is to clarify the information that is necessary to determine whether the borrower is ineligible for the primary loan servicing options based on a lack of good faith due to fraud, waste, or conversion. Farmers Home Administration (FmHA) regulations 1951.909(c)(2) requires FmHA to substantiate "any allegations of fraud, waste, or conversion used in order to deny borrowers' requests for Primary Loan Service Programs" with a written legal opinion from the Office of the General Counsel (OGC), before denying the borrower's requests. The attached questionnaire is a Guide Letter for this purpose. Please use the attached questionnaire or a substitute approved by your Regional OGC.

COMPARISON WITH PREVIOUS AN:

No previous AN has been issued on this subject.

IMPLEMENTATION RESPONSIBILITY:

In all cases where FmHA will be denying the borrower the primary loan servicing options based on a lack of good faith due to fraud, waste, or conversion, the attached form or an OGC approved substitute will be completed to determine if there is enough documentation to justify turning down the borrower's request for the primary loan servicing options.

NEAL SOX JOHNSON
Acting Administrator

Attachment

EXPIRATION DATE: December 31, 1989

FILING INSTRUCTIONS:
Preceding FmHA
Instruction 1951-S



Farmers Home Administration is an Equal Opportunity Lender.
Complaints of discrimination should be sent to:
Secretary of Agriculture, Washington, D.C. 20250

1877(1951)

GENERAL GUIDELINES FOR DETERMINATION OF LACK OF
GOOD FAITH BECAUSE OF FRAUD, WASTE AND
CONVERSION UNDER 7 C.F.R. SECTION 1951.909(c)(2)

The following are the general elements of fraud, waste, and conversion which will be used by the Office of the General Counsel (OGC) rendering its opinion in the possible denial of borrowers' request for Primary Loan Service servicing pursuant to 7 C.F.R. Section 1951.909(c)(2). Please bear in mind these are general elements only and are furnished for FmHA's preliminary analysis only. The particular fact situation relative to the law will dictate the contents of OGC's opinion in each individual case. Each OGC office should refer to applicable State law in determining whether the necessary elements have been met in each case.

ELEMENTS

FRAUD:

- (1) A false representation or omission of fact
- (2) Materiality of fact
- (3) Borrower's knowledge of its falsity
- (4) Borrower's intent that the representation or omission should be acted on by FmHA
- (5) FmHA's ignorance of its falsity
- (6) FmHA's reliance on the representation or omission, and
- (7) FmHA's consequent and proximate injury or damage

WASTE:

- (1) Unlawful act or omission on part of borrower
- (2) Affects FmHA security
- (3) Results in permanent injury to FmHA security
- (4) Borrower is in lawful possession of FmHA, and security

- May be:
- (a) active waste - intentional destruction of FmHA security
 - (b) permissive waste - allowing death, decay, deterioration, disrepair, or destruction of FmHA security through inexcusable neglect or negligence, or
 - (c) equitable waste - allowing death, decay, deterioration, disrepair, or destruction of FmHA security by not following management practices that a prudent person would have followed under similar circumstances.

1877(1951)

CONVERSION:

- (1) Valid lien by FmHA in security
- (2) Willful and/or malicious disposal of security by debtor(s)
- (3) Failure to obtain consent of disposal from FmHA, and
- (4) Injury to FmHA

QUESTIONNAIRE TO BE COMPLETED AND FURNISHED TO THE
OFFICE OF GENERAL COUNSEL WHEN SEEKING OPTIONS
ON DENIAL OF REQUESTS FOR PRIMARY LOAN SERVICE
PROGRAMS ON THE BASIS OF BAD FAITH

- I. FRAUD: Are you making an allegation that the borrower is not in good faith because of fraud against FmHA? Yes ___ No ___ (If yes, completely answer the following questions and furnish applicable documentation. Attach additional sheets if necessary.)
- A. Did the borrower make a false representation to FmHA? Yes ___ No ___ (If yes, specifically set out the false representation or attach a copy if written. _____
 _____.
- B. Was the false representation material to FmHA's decision to loan the borrower money, or to restructure, refinance, or compromise an existing loan? Yes ___ No ___ (If yes, specifically set out the importance of the false representation.) _____
 _____.
- C. Did the borrower know the information was false, or did the borrower intentionally omit material information? Yes ___ No ___ (If yes, specifically set out why you think the borrower had knowledge of the false information or intended to omit material information.) _____
 _____.
- D. Did FmHA know at the time that the representation or omission made was false and intentional? Yes ___ No ___ (If no, when did FmHA learn of the false representation or omission of fact?) _____
 _____.
- E. Did FmHA reply on the false representation or omission of a material fact when it loaned the borrower money, or restructured, refinanced, or compromised an existing loan? Yes ___ No ___ (Specifically set out the basis for your opinion.) _____
 _____.

- F. What was the date of the alleged fraud? _____.
- G. Set out specifically the injury FmHA suffered because of the false representation or omission of a material fact. _____.
- H. What actions did FmHA take once the alleged fraud was discovered? _____.
- I. Other facts for OGC to consider in its analysis: _____.

II. WASTE: Are you making an allegation that the borrower is not in good faith because of waste against FmHA's security? Yes___ No___ (If yes, completely answer the following questions and furnish applicable documentation. Attached

- A. If real estate security was involved, was borrower in lawful possession of FmHA's real security? _____.
- B. Did the borrower actively destroy all or part of FmHA's security? Yes___ No___ (If yes, specifically set out the fact supporting your opinion.) _____.
- C. Did the borrower allow the death, decay, deterioration, disrepair, or destruction of FmHA's security through inexcusable neglect or negligence? Yes___ No___ (If yes, specifically set out the facts supporting your opinion.) _____.
- D. Did the borrower allow the death, decay, deterioration, disrepair, or destruction of FmHA's security by not following management practices that a prudent person would have followed under similar circumstances? Yes___ No___ (If yes, specifically set out the facts supporting your opinion.) _____.

E. When did the alleged waste take place? _____

F. What actions did FmHA take once the alleged waste was discovered? _____

G. What permanent injury was caused to FmHA's security by the alleged act of waste? (Set out in detail the monetary loss suffered by FmHA.) _____

H. Other facts for OGC to consider in its analysis: _____

III. CONVERSION: Are you making an allegation that the borrower is not in good faith because of conversion of FmHA security? Yes _____
No _____ (If yes, completely answer the following questions and furnish application documentation. Attach additional sheets if necessary.)

A. What was the type and dollar value of collateral converted. List the approximate dates of conversion and the buyer's identity as near as FmHA knows or can guess. _____

B. Was the collateral sold by the borrower without authorization, or was it sold with authorization but the borrower failed to account for the proceeds? _____

C. Did the borrower dispose of FmHA's security in conscious and knowing violation of the provisions of all previous agreements, instructions and regulations of FmHA? Yes _____ No _____ (If so, specifically set out the basis for your opinion.) _____

- D. What use did the borrower make of the proceeds of the converted items? (If you are not sure, give your best guess and the basis for that opinion.)

_____.
- E. Are there any aggravating or mitigating circumstances known? Yes___ No___ (If so, specifically set out the basis for your opinion.)

_____.
- F. What was the date of the last previous security/collateral check by FmHA prior to the alleged act of conversion? (Please summarize the findings of that chattel check.) _____

_____.
- G. Had the borrower ever converted collateral before the incident(s) in question? If so, when did it happen, what was involved, and what action did FmHA take? Also, have any new loans been granted to the borrower after the time FmHA became aware of any conversions? _____

_____.
- H. What was the actual County Office procedure in granting approval for this borrower to sell collateral - not just what FmHA regulations say? _____

_____.
- I. What excuses, statements or confessions did the borrower make regarding the missing collateral? When and to whom were these statements made? _____

_____.
- J. Has there been a contract investigation, referral to OGC, or referral to OIG of the matter? Yes___ No___ (If so, please set out details of referral. If not, specifically state why a referral of the conversion was not made.) _____

_____.

- K. Set out specifically the injury FmHA suffered because of alleged conversion of its security.

_____.

- L. Other facts for FmHA to consider in its analysis: _____

_____.